Court File No. T-1843-18

FEDERAL COURT OF CANADA

BETWEEN:

SNC-LAVALIN GROUP INC., SNC-LAVALIN INTERNATIONAL INC.
and SNC-LAVALIN CONSTRUCTION INC.

Applicants/
(Responding Parties)

and

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent/
(Moving Party)

MOTION RECORD OF THE MOVING PARTY

January 8, 2019

PERLEY-ROBERTSON, HILL & McDOUGALL LLP/s.r.l.
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Lawyers for the Moving Party

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Lawyers for the Responding Parties

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Court File No. T-1843-18

FEDERAL COURT OF CANADA

BETWEEN:

SNC-LAVALIN GROUP INC., SNC-LAVALIN INTERNATIONAL INC.
and SNC-LAVALIN CONSTRUCTION INC.

Applicants

and

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

NOTICE OF MOTION

(RESPONDENTS' MOTION TO STRIKE UNDER
RULE 359 OF THE *FEDERAL COURT RULES*)

TAKE NOTICE THAT the Respondent will make a motion to the Court on Friday, February 1, 2019 at 9:30 a.m., or as soon thereafter as the motion can be heard, at the Federal Court at 30 McGill Street in Montreal, pursuant to Rule 359 of the *Federal Courts Rules*.

The Moving Party estimates that the Motion will require up to four (4) hours to be heard.

THE MOTION IS FOR:

1. An Order that the Applicant's application be struck without leave to amend pursuant to Rule 359 of the *Federal Courts Rules*.

2. If this motion is successful in whole or in part, an award of costs in favour of the Respondents.

3. Such further and other relief as counsel may request and this Honourable Court deems just.

THE GROUNDS FOR THE MOTION ARE

1. The application is bereft of any possibility of success.
2. The exercise of prosecutorial discretion is not amenable to judicial review in this Court.
3. This Court lacks jurisdiction, as the Respondent was not exercising powers of a federal board, commission or other tribunal when performing the actions complained of.
4. The requested order in the nature of *mandamus* to compel the exercise of discretion is not available as a matter of law.
5. This Court has limited jurisdiction over criminal matters. Such jurisdiction does not extend to the actions complained of in this application. Even if this Court has such jurisdiction, it should decline to exercise the jurisdiction so as not to fragment the criminal process.
6. Rule 359 of the *Federal Courts Rules*.
7. *Federal Court Act* s. 2, 18 and 18.1.
8. *Criminal Code* Part XXII.1, R.S.C., 1985, c. C-46.
9. *Director of Public Prosecutions Act*, S.C. 2006, c. 9, s. 121.
10. If this motion succeeds, in whole or in part, an award of costs would be appropriate having regard to Rules 400 and 401 of the *Federal Courts Rules*.
11. Such further and other grounds as counsel may advise and this Honourable Court permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

a) The Applicant's Notice of Application dated October 19, 2018; and

b) Such further and other material as counsel may advise and this Honourable Court may permit.

Date: January 8, 2019

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Lawyers for the Applicants

Court File No. T-1843-18

FEDERAL COURT

SNC-LAVALIN GROUP INC. *et al.*
Applicants

and

THE DIRECTOR OF PUBLIC PROSECUTIONS
Respondent

NOTICE OF MOTION

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TAB 2

Court File No. T- 1843 -18

FEDERAL COURT

BETWEEN:

SNC-LAVALIN GROUP INC., SNC-LAVALIN INTERNATIONAL INC. and SNC-LAVALIN CONSTRUCTION INC.

Applicants

- and -

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the applicants. The relief claimed by the applicants appears on the following pages.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicants. The applicants request that this application be heard at Montreal, Quebec.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicants' solicitors WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

October 19, 2018

Issued by: L'ORIGINAL A ÉTÉ SIGNÉ PAR INGRID BORDES
HAS SIGNED THE ORIGINAL
(Registry Officer)

Address of local office: 30 McGill St.,
Montréal, Québec H2Y 3Z7

TO: THE ADMINISTRATOR
Federal Court
30 McGill St.,
Montréal, Québec H2Y 3Z7

30 McGill St.
Montreal, Quebec H2Y 3Z7
Tel.: (514) 283-4820
Telecopier: (514) 283-6004

AND TO: THE DIRECTOR OF PUBLIC PROSECUTIONS
160 Elgin Street
Ottawa, Ontario
K1A 0H8

APPLICATION

1. This is an application for judicial review in the matter of the conduct of the Respondent, the Director of Public Prosecutions ("DPP"), in relation to a decision rendered on October 9, 2018 not to issue an invitation to negotiate a remediation agreement, pursuant to section 715.32(1) and following of the *Criminal Code*, RSC 1985, c C-46 to the Applicants, SNC-Lavalin Group Inc., SNC-Lavalin International Inc. and SNC-Lavalin Construction Inc.

2. The Applicants make application for:

   (a) An Order declaring unlawful the decision of the DPP not to issue an invitation to negotiate a remediation agreement pursuant to section 715.32 of the *Criminal Code* to the Applicants;

   (b) An Order requiring the DPP to issue an invitation to negotiate a remediation agreement forthwith to the Applicants, and to proceed with good faith negotiations regarding a remediation agreement, forthwith;

   (c) An Order permitting the hearing of the application, and all proceedings relating thereto, on an expedited and *in camera* basis;

   (d) Such further and other relief as counsel may advise and this Court deems just.

3. The facts giving rise to this decision are described in the following paragraphs.

The Parties

4. The role of the DPP is set out in sections 3(3), (8) and (9) of the *Director of Public Prosecutions Act*, SC 2006, c 9. Pursuant to this statute, the DPP is tasked with the prosecution of criminal offences in Canada. More specifically, pursuant to section 3(3) of the *Director of Public Prosecutions Act*, the Director is responsible for:

(a) initiating and conducting federal prosecutions;

(b) intervening in proceedings that raise a question of public interest that may affect the conduct of prosecutions or related investigations;

(c) issuing guidelines to federal prosecutors;

(d) advising law enforcement agencies or investigative bodies on general matters relating to prosecutions and on particular investigations that may lead to prosecution;

(e) communicating with the media and the public on all matters respecting the initiation and conduct of prosecutions;

(f) exercising the authority of the Attorney General of Canada in respect of private prosecutions; and

(g) exercising any other power or carrying out any other duty or function assigned by the Attorney General that is compatible with the office of the Director.

[emphasis added]

5. The Applicant SNC-Lavalin Group Inc. is a global fully integrated professional services and project management company and a major player in the ownership of infrastructure. From headquarters in Montreal, SNC-Lavalin Group Inc.'s employees provide comprehensive capital investment, consulting, design, engineering, construction management, sustaining capital and operations and maintenance services to clients across oil and gas, mining and metallurgy, infrastructure, clean power, nuclear energy and EDPM (engineering design and project management).

6. The Applicants SNC-Lavalin International Inc. and SNC-Lavalin Construction Inc. are wholly-owned subsidiaries of SNC-Lavalin Group Inc.

The Remediation Agreement Regime

7. On March 27, 2018, the Government of Canada introduced Bill C-74, *An Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures* (the "Budget Implementation Act"). Included in the Budget Implementation Act was a series of amendments to Part XXII of the *Criminal Code* intended to establish a remediation agreement regime, similar to regimes which exist in other jurisdictions, applicable to organizations alleged to have committed an offence.

8. Subsequently, on June 21, 2018 the Government of Canada enacted certain amendments to Part XXII of the *Criminal Code* to provide for the establishment of a remediation agreement regime. These amendments came into force on September 21, 2018.

9. The remediation agreement regime represents a major change in Canadian criminal law. It is a legal tool which permits the prosecutor to secure all of the elements of a conviction except for the finding of guilt. In essence, remediation agreements permit the Crown to hold organizations and individuals responsible for their wrongdoing and any harm caused, while reducing the negative consequences of that wrongdoing on innocent stakeholders.

10. This is reflected in new section 715.31 of the *Criminal Code*, which states that the objectives of the remediation agreement regime are:

(a) to denounce an organization's wrongdoing and the harm the wrongdoing has caused to victims or to the community;

(b) to hold the organization accountable for its wrongdoings through effective, proportionate and dissuasive penalties;

(c) to contribute to respect for the law by imposing an obligation on the organization to put in place corrective measures and promote a compliance culture;

(d) to encourage voluntary disclosure of the wrongdoing;

(e) to provide reparations for harm done to victims or to the community; and

(f) to reduce the negative consequences of the wrongdoing for persons -- employees, customers, pensioners, and others -- who did not engage in the wrongdoing, while holding responsible those individuals who did engage in that wrongdoing.

[emphasis added]

Invitation to negotiate

11. The amendments provide that the prosecutor may issue an invitation to enter into negotiations for a remediation agreement if certain conditions are met. These conditions are found in new **sections 715.32(1) and (2).**

12. According to **section 715.32(1)(*a*) to (*c*),**[1] the prosecutor may issue an invitation if the prosecutor is of the opinion that:

(a) there is a reasonable prospect of a conviction with respect to the offence;

(b) the act or omission that forms the basis of the offence did not cause and was not likely to have caused seriously bodily harm or death, or injury to national defence or national security, and was not committed for the benefit of, at the direction of, or in association with, a criminal organization or terrorist group;

---

[1] Paragraph 715.32(1)(*d*) also requires the consent of the Attorney General of Canada to the negotiation of the remediation agreement. The authority of the Attorney General of Canada under this provision has been assigned or delegated to the DPP pursuant to section 3(3)(*g*) of the Director of Public Prosecutions Act referred to above.

(c) negotiating the agreement is in the public interest and appropriate in the circumstances.

[emphasis added]

13. For the purposes of assessing whether negotiating a remediation agreement is in the public interest and appropriate in the circumstances, **section 715.32(2)** further provides that the prosecutor must consider certain additional factors namely:

(a) the circumstances in which the act or omission that forms the basis of the offence was brought to the attention of investigative authorities;

(b) the nature and gravity of the act or omission and its impact on any victim;

(c) the degree of involvement of senior officers of the organization in the act or omission;

(d) whether the organization has taken disciplinary action, including termination of employment, against any person;

(e) whether the organization has made reparations or taken other measures to remedy the harm caused by the act or omission and to prevent the commission of similar acts or omissions;

(f) whether the organization has identified or expressed a willingness to identify any person involved in wrongdoing related to the act or omission;

(g) whether the organization – or any of its representatives – was convicted of an offence or sanction by a regulatory body, or whether it entered into a previous remediation agreement or other settlement, in Canada or elsewhere, for similar acts or omissions;

(h) whether the organization – or any of its representatives – is alleged to have committed any other offences, including those not listed in the schedule to this part; and

(i) any other factor that the prosecutor considers relevant.

[emphasis added]

14. As can be seen, the decision to issue an invitation to negotiate a remediation agreement is a matter of discretion on the part of the prosecutor. However, the Applicants submit that the prosecutor's discretion is not unfettered and must be exercised reasonably in accordance with the statutory objectives and factors set out above.

15. In this regard, it is also noteworthy that, in the event that an invitation to negotiate is issued and that negotiations are successful, the resulting remediation agreement must contain certain components including a statement of facts related to the offence; an acknowledgment of responsibility; an acknowledgment of the obligation to pay any fine imposed; and a warning that the breach of any term of the agreement may lead to an application by the prosecutor for termination of the agreement and a recommencement of proceedings. The remediation agreement

must also be approved by the Court pursuant to an application in writing by the prosecutor (sections 715.34 and 715.37(1) of the *Criminal Code*).

Similar regimes in other jurisdictions

16. The remediation agreement regime is similar, although not identical, to regimes providing for "deferred prosecution agreements" in other jurisdictions, including the United States and the United Kingdom. Indeed, Canada was considerably influenced in choosing to adopt a remediation agreement regime by the examples and experience of the United States and the United Kingdom.

17. Deferred prosecution agreements have a lengthy history in the U.S. They have existed since approximately 1992, and are available in a broad range of corporate criminal matters. Unlike the Canadian remediation agreement regime, however, deferred prosecution agreements in the United States are negotiated between the prosecutor and the accused, and are not subject to Court review and approval.

18. Deferred prosecution agreements have existed in the United Kingdom since February 24, 2014, under the provisions of Schedule 17 of the *Crime and Courts Act 2013* (UK), 2013, c 22. Pursuant to this legislation, and unlike the Canadian approach, both the initial application for a deferred prosecution agreement and any eventual agreement reached by the parties are subject to Court approval.

19. According to various public sources, numerous large, multi-national businesses, including various competitors of the Applicants, have availed themselves of deferred prosecution agreements

or similar legislative provisions in other jurisdictions. The Applicants believe that this was one of the reasons for the introduction of a similar regime in Canada.

The Charges

20. On or about February 19, 2015, the DPP caused criminal charges to be laid against the Applicants with respect to allegations of misconduct, contrary to the section 3(1)(*b*) of the *Corruption of Foreign Public Officials Act*, SC 1998, c 34 and section 380(1) of the *Criminal Code*, in relation to certain construction contracts in Libya. The offences are alleged to have taken place between 2001 and 2011.[2]

21. The preliminary inquiry into these charges is scheduled to commence on October 29, 2018 and to last for 3 weeks. If the defendant is committed to trial on the charges, the trial will likely take place in 2019 or 2020.

Discussions with the DPP

22. In or about the month of April 2018, shortly after the Government of Canada introduced the proposed legislative changes to implement a remediation agreement regime, the Applicants contacted the lawyers within the Public Prosecution Service of Canada ("PPSC") responsible for the prosecution of the charges against the Applicants under the direction of the DPP.

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[2] The Applicants deny any wrongdoing and further state that the activities in question were carried out without their knowledge and consent by two former employees and were unknown to the Applicants prior to the execution of the RCMP search warrants relating to the charges in 2012.

23. Because neither the DPP nor the PPSC chose to undertake any formal steps towards a remediation agreement regarding this matter (or any other) prior to the enactment of the legislation, the purpose of this contact, and of the discussions which followed, was to ensure that the DPP possessed all relevant information the Applicants could provide in relation to the eventual issuance of an invitation to negotiate a remediation agreement, once the enabling legislation was in force.

24. During the next three months, pursuant to requests made by the PPSC, the Applicants provided detailed information (on a without prejudice basis) which, the Applicants believe, demonstrates that the statutory objectives of the remediation agreement regime and the criteria for the issuance of an invitation to negotiate a remediation agreement are easily met in this instance. The Applicants made repeated submissions to this effect to the PPSC based on the information provided and the comprehensive remedial action they had taken.

25. Without limiting the generality of the foregoing, the Applicants provided substantial information pertaining to the relevant criteria for the issuance of an invitation to negotiate a remediation agreement, as set out in section 715.32(1) and (2), including the public interest criterion, as follows:

(a) information pertaining to the efforts undertaken by SNC-Lavalin to adopt and implement a world-class ethics and compliance program since the events in question came to light in 2012, with a view to ensuring that the alleged wrongdoing is not repeated (in accordance with the requirements of section 715.32(2)(*e*), "*whether the organization has* [...] *taken other measures* [...] *to prevent the commission of similar acts or omissions*");

(b) information attesting to the successful assessment of SNC-Lavalin's implementation of its ethics and compliance program by independent monitors (section 715.32(2)(*e*));

(c) information pertaining to the complete turn-over of the SNC-Lavalin's senior management and Board of Directors since the events in question (section 715.32(*e*));

(d) information pertaining to the severance or dismissal of senior officers who could be considered as having been even remotely associated with the activities in question (section 715.32(2)(*d*), "*whether the organization has taken disciplinary action, including the termination of employment, against any person who was involved in the act or omission*" and (*e*));

(e) information pertaining to the dramatic consequences of continued legal proceedings, the possibility of an eventual conviction and of subsequent debarment from bidding, on the Applicants' employees, customers, pensioners and other stakeholders who did not engage in the wrongdoing ("*to reduce the negative consequences of the wrongdoing for persons – employees, customers, pensioners and others – who did not engage in the wrongdoing* [...]", section 715.31(*f*)).

26. The Applicants presented specific information regarding the criteria for an invitation to negotiate a remediation agreement, including information regarding:

(a) the Anti-Corruption training program provided to virtually all employees; the Applicants' Code of Ethics; the Applicants' Compliance Procedure;

(b) the steps taken by the Applicants with respect to employees who participated in, knew of or condoned the alleged wrongdoing;

(c) the changes in personnel at the most senior levels, including a 100% turnover at the level of the Board of Directors and the Executive Committee of the Company;

(d) the negative impact of the charges on the Applicants' business, including in particular the impact on employment and business activity in Canada;

(e) the negative impact of the ongoing uncertainty related to the charges on the Applicants' business; and

(f) the unfair repercussions on the Applicants' business of a lengthy criminal trial with possible appeals including the impact on employment and business activity in Canada, particularly given an environment in which competitors of the Applicants can and have availed themselves of deferred prosecution agreements in other jurisdictions.

27. During the course of these exchanges, the Applicants also confirmed their willingness to address the following questions which pertain to the objectives of the remediation agreement regime, in the event that an invitation to negotiate were issued:

(a) the denunciation of the wrongdoing and the harm caused through the negotiation of a statement of facts related to the offence (section 715.31(*a*)) and through an undertaking not to make or condone any public statement that contradicts those facts (as required by section 715.34(1)(*a*));

(b) the negotiation of effective, proportionate and dissuasive penalties (section 715.31(*b*)); and

(c) the negotiation of reparations for harm done to victims or to the community (section 715.31(*e*)).

28. The Applicants also made it plain that negotiating a remediation agreement would reduce the significant ongoing negative consequences the continued prosecution of the charges would have on employees, customers, pensioners and others who did not engage in the wrongdoing (section 715.31(*f*)), even in the event of an eventual acquittal on the pending charges.

29. It is also self-evident that a remediation agreement, if successfully negotiated, would *ipso facto* offer the following additional benefits or advantages from the public interest perspective:

(a) a remediation agreement would permit the DPP to avoid the costs and uncertainties inherent in any criminal prosecution, while nevertheless exacting a substantial financial penalty and related undertakings, all within an independent mechanism that requires Court approval;

(b) the DPP would know that the Applicants have made permanent transformative changes to their business practices such that the alleged misconduct is most unlikely to be repeated;

(c) the DPP would be able to ensure that the Applicants adhere to their new governance practices through direct monitoring, reporting and oversight for a reasonable period of time;

(d) the DPP would also have the option of reinstituting legal proceedings against the Applicants in the unlikely event that they failed to comply with the terms of the remediation agreement at a future date; and

(e) as the Applicants will not enter a guilty plea and have substantial defences to the charges, the alternative to a remediation agreement is a long, expensive and contentious criminal proceeding, the outcome of which is uncertain for both parties.

30. The Applicants also requested an opportunity to meet with the DPP, in order to better explain the materials and submissions provided, respond to any questions she might have and, generally to discuss these issues and the extremely negative consequences of ongoing legal proceedings on the Applicants and their stakeholders including employees, suppliers, pensioners and shareholders, in the event that an invitation to negotiate was not issued by the Respondents. The Applicants proposed that their President and Chief Executive Officer, Mr. Neil Bruce, would participate in such a meeting.

The Decision of the DPP

31. By letter dated October 9, 2018, the DPP, through her prosecutor (the PPSC), informed the Applicants in writing of her decision not to issue an invitation to negotiate a remediation agreement on the grounds, baldly stated, that she was of the view that "*an invitation to negotiate a remediation agreement is not appropriate in this case.*" She also declined the Applicants' request for an in-person meeting, as she "*did not believe there was a need for it, given all the material and submissions provided to her.*" A copy of the DPP's letter is attached as Appendix "A" hereto.

32. The decision of the DPP is based on an unreasonable exercise of her discretion and must be set aside for several reasons.

33. **First,** the DPP apparently failed to properly weigh the information and submissions provided by the Applicants in the light of two key objectives of the remediation agreement regime: reducing the negative consequences of the wrongdoing on innocent stakeholders who did not engage in the wrongdoing, while holding responsible those who did engage in the wrongdoing.

34. Specifically, the DPP failed to consider or properly assess:

(a) the extensive information provided by the Applicants regarding the turnover of senior management and the severance of any individuals who might have directed, condoned or participated in the wrongdoing which gave rise to the charges. It is particularly noteworthy in this regard that only one individual, who left SNC-Lavalin Group Inc. seven years ago and is being civilly pursued by the company for a massive related embezzlement, has been charged regarding the same matter;

(b) the willingness of the Applicants to address, in the negotiation of a remediation agreement, all of the issues regarding the objectives of the remediation agreement regime and the criteria for receiving an invitation to negotiate not otherwise covered in the information provided by the Applicants; and

(c) the extensive information provided regarding the extremely negative consequences the underlying legal proceedings have had and will continue to have (even in the event of an acquittal) on the Applicants and innocent stakeholders, including employees, suppliers, pensioners and shareholders, in the absence of an invitation to negotiate. In fact, the significant harm to innocent stakeholders became apparent immediately following the announcement that the DPP did not intend to issue an invitation to negotiate to the Applicants, as will be shown at the hearing of this application.

35. **Second,** as stated above in paragraph 12, section 715.32(1)(*c*) permits the prosecutor to enter into negotiations for a remediation agreement if he or she is of the opinion that "*negotiating the agreement is in the public interest and appropriate in the circumstances.*" [emphasis added].

36. The DPP's decision refers only to the second requirement, namely, her conclusion that negotiations would not be "*appropriate in this case*". This suggests that the Applicants had satisfied the first requirement – *i.e.*, that negotiations would be in the public interest – and that the DPP concluded that negotiations would not be appropriate despite this fact.

37. This is an incoherent application of the relevant criteria. When the DPP concludes that negotiations "would be in the public interest", it must follow that they would also be "appropriate", absent clear and compelling reasons to the contrary. No such reasons were given or exist in this situation. The DPP's conclusion – stated without explanation and seemingly without regard to the public interest – negates the very purpose of the legislation.

38. **Third,** far from providing compelling reasons to justify her decision, the DPP's letter gives no reasons to justify or support her conclusion that an invitation to negotiate was "not appropriate". She did not respond in any meaningful way to the voluminous information provided by the Applicants, and her reasoning cannot be discerned. The Applicants are in the dark as to how they failed to meet the requirement of "appropriateness", or why the public interest requirement, though met, has apparently been ignored.

Jurisdiction of the Court

39. The Federal Court has jurisdiction to hear this application for judicial review of the matter described above and to grant the relief sought pursuant to sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. In addition, the Applicant relies on the *Federal Court Rules* and such additional grounds as counsel may identify.

40. This application will be supported by the following material:

(a) The confidential affidavits of one or more individuals;

(b) Such further and other materials as counsel may advise and this Honourable Court permit.

MONTRÉAL, October 19, 2018

Torys Law Firm LLP

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Lawyers for the Applicants

I HEREBY CERTIFY that the above document is a true copy of the original issued out of/filed in the Court on the _____
OCT 19 2018
day of _____ A.D. 20 ____
OCT 19 2018
Dated this ____ day of _____ 20____

INGRID BORDES
AGENT DU GREFFE
REGISTRY OFFICER

Service des poursuites pénales du Canada

Bureau régional du Québec
Complexe Guy-Favreau
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BY E-MAIL

October 9, 2018, 2018

The Hon Frank Iacobucci QC LSM,
Me William McNamara
TORYS
79 Wellington St. W., 30th Floor
Box 270, TD South Tower
Toronto, Ontario
M5K 1N2

SUBJECT: **Projet Assistance - Groupe SNC Lavalin inc. / SNC Lavalin international inc. / SNC Lavalin Construction inc.**
Court No : 500-73-004261-158
Our file: 3232289

Dear Hon Iacobucci and Me McNamara,

I write to you on behalf of the Director of Prosecutions of Canada (the DPP). She wishes to thank-you for your letters dated September 7 and September 17 2018, as well as your e-mail of September 18th 2018 and the documents provided on behalf of your client on September 27th in which you provide further material following her decision not to issue an invitation to negotiate a remediation agreement to your client regarding the charges it currently faces, as communicated to you on September 4 2018.

I can confirm that the DPP has done a detailed review of all of the material submitted. I am informed that she continues to be of the view that an invitation to negotiate a remediation agreement is not appropriate in this case.

Therefore no invitation to negotiate a remediation agreement will be issued and as a result crown counsel shall continue with the prosecution of this case in the normal course including the preliminary inquiry scheduled to commence on October 29th.

With respect to your request for an in person meeting between yourself, the CEO of the Groupe SNC-Lavalin inc and the DPP, she does not believe there is a need for it, given all the material and submissions already provided to her.

Richard Roy
Counsel for the Director of Public Prosecutions

/

TAB 3

Court File No. T-1843-18

FEDERAL COURT OF CANADA

BETWEEN:

SNC-LAVALIN GROUP INC., SNC-LAVALIN INTERNATIONAL INC.
and SNC-LAVALIN CONSTRUCTION INC.

Applicants

and

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

(Application pursuant to Rule 359 of the *Federal Courts Rules*)

MEMORANDUM OF FACT AND LAW OF THE DIRECTOR OF PUBLIC PROSECUTIONS

PERLEY-ROBERTSON, HILL & McDOUGALL LLP/s.r.l.

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Counsel for the Respondent

Table of Contents

PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The Director of Public Prosecutions ("DPP") is prosecuting serious criminal charges against SNC-Lavalin Group Inc., SNC-Lavalin International Inc. and SNC-Lavalin Construction Inc. ("the Applicants") in the Court of Québec. In this application for judicial review, the Applicants seek to compel the Respondent to exercise her prosecutorial discretion with a view to negotiating a resolution of the matter with the ultimate objective of having the criminal charges stayed.

2. The Application is bereft of any possibility of success and should be struck.

3. Firstly, the exercise of prosecutorial discretion is not subject to review by the courts, save in the case of an abuse of process. This has been confirmed many times by the Supreme Court of Canada. The application does not, however, allege abuse of process. Rather, it asks this court to review the exercise of prosecutorial discretion based on administrative law principles that have no application in the criminal justice system. Secondly, the proper venue for challenging an alleged improper exercise of prosecutorial discretion is in the Quebec criminal court.

4. In any event, the Respondent is not a federal board, commission or tribunal. Even if the Federal Court did have jurisdiction, the application should be dismissed given the greater expertise and familiarity of the provincial court in the area of criminal law.

B. Statement of Facts

(i) Parties

5. The Applicants have been charged with two offences: bribing a foreign public official contrary to s. 3(1)(b) of the *Corruption of Foreign Public Officials Act*., S.C. 1998, c. 34 and fraud under s. 380(1) of the *Criminal Code* RSC 1985 c.C. 46 ("the Criminal Charges"). The Applicants have pleaded not guilty.

***Notice of Application,* para. 20, Moving Party's Motion Record ("Motion Record"), Tab 2, p. 15**

6. The Criminal Charges against the Applicants are being prosecuted by the Director of Public Prosecutions.

***Notice of Application,* para. 20, Motion Record, Tab 2, p. 15**

7. The preliminary inquiry into the Criminal Charges is underway in Quebec. If the Applicants are committed to trial, a criminal trial will take place in the Quebec court of criminal jurisdiction.

***Notice of Application,* para. 21, Motion Record, Tab 2, p. 15**

(ii) Remediation Agreements under the *Criminal Code*

8. Part XXII.1 of the *Criminal Code* provides a remediation agreement regime. In certain circumstances, after the prosecutor has invited an organization to negotiate, a prosecutor and an organization *may* enter into a remediation agreement. Where the prosecutor applies to the court

(defined in the legislation as the superior court of criminal jurisdiction) and the remediation agreement is approved, the criminal proceeding will be stayed as long as there is compliance with the agreement.

9. There is no statutory right in the *Criminal Code* for an organization to ask to be invited to negotiate a remediation agreement. Similarly, there is nothing that compels a prosecutor to enter into negotiations for a remediation agreement with an organization alleged to have committed an offence.

***Criminal Code*, s. 715.32(1), Moving Party's Appendix A to the Memorandum of Fact and Law ("Appendix A"), Tab 2**

10. A prosecutor "may enter into negotiations" if she sees fit. Prior to doing so, there are a number of conditions and factors that the prosecutor must be satisfied will be met.

***Criminal Code*, s. 715.32, Tab 2 of Appendix A**

11. Where the parties do enter into negotiations and reach an agreement, and the prosecutor applies to get it approved by the superior court of criminal jurisdiction ("the Court"), the prosecutor must then direct that the criminal proceedings against the organization be stayed. If the Court subsequently determines that the remediation agreement has been breached, it may be terminated and the proceedings which were stayed may be recommenced. Alternatively, if there has been compliance with the remediation agreement as determined by the Court, the proceedings are deemed never to have been commenced and no other proceedings for the same offence may be initiated against the organization.

***Criminal Code s. 715.38(7)*, Tab 2 of Appendix A**

12. The Court exercises a supervisory jurisdiction over remediation agreements, but only once the prosecutor and the organization have negotiated the terms of same and have presented it to the Court for approval.

***Criminal Code s. 715.41(1)*, Tab 2 of Appendix A**

(iii) The Applicant's Desire to be Invited to Negotiate a Remediation Agreement

13. The Government of Canada introduced the remediation agreement regime in the legislative amendments to the *Criminal Code* on March 27, 2018. Royal assent was received on June 21, 2018. The Applicants then initiated contact with the Respondent to provide it with information which it perceived would be relevant to the Respondent deciding whether an invitation to negotiate a remediation agreement would be extended.

***Notice of Application*, paras. 22 and 23, Motion Record, Tab 2, pp. 15-16**

14. The Applicants, over a period of several months, then provided documentation to the Respondent setting out their views on why the Applicant should receive an invitation to negotiate a remediation agreement. The Applicants also requested to meet in person with the Respondent.

***Notice of Application*, paras. 22 and 23, Motion Record, Tab 2, pp. 15-16**

15. The Respondent, by letter dated October 9, 2018 ("the October 9, 2018 Letter"), confirmed to the Applicants that it had done a detailed review of all of the material submitted by the Applicants and was not issuing an invitation to negotiate a remediation agreement. Additionally, having reviewed all of the material forwarded by the Applicants, the Respondent declined the request for a meeting. The Applicants were advised that the criminal prosecution of the case against them would continue. ("the October 9, 2018 letter").

***Notice of Application,* para. 31, Motion Record, Tab 2, p. 21**

(iv) The Application for Judicial Review

16. The criminal proceedings against the Applicants are currently underway in Quebec. While these proceedings are underway the Applicants seek judicial review in this court of the decision of the Respondent to not issue an invitation to negotiate a remediation agreement and thus to continue with the criminal prosecution in the Quebec court.

17. By way of remedy, the Applicants seek, *inter alia*:

a) "an Order declaring unlawful the decision of DPP not to issue an invitation to negotiate a remediation agreement …"

b) "an Order requiring the Respondent to issue an invitation to negotiate a remediation agreement to the Applicants, and to proceed with good faith negotiations regarding a remediation agreement, forthwith".

***Notice of Application,* para. 2, Motion Record, Tab 2, p. 7**

18. The Applicants submit that while the Respondent has discretion on whether or not to issue an invitation to negotiate a remediation agreement, the discretion must be exercised reasonably and in accordance with the statutory regime regarding remediation agreements.

***Notice of Application,* paras. 14 and 32, Motion Record, Tab 2, pp. 13 and 21**

19. Specifically, the Applicants allege that the Respondent did not properly weigh the information and submissions it made. Additionally, the Applicants suggest that because the October 9, 2018 Letter did not specifically refer to the public interest but only to the conclusion by the Respondent that it was not appropriate to issue an invitation to negotiate a remediation agreement, then the Respondent must have concluded that it would be in the public interest.[1]

***Notice of Application,* para. 33, Motion Record, Tab 2, p. 21**

PART II – POINTS IN ISSUE

A. The Test to be applied on a motion to strike an application for judicial review.

B. The statutory scheme and prosecutorial discretion - not amenable to judicial review.

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[1] Even if the Respondent was correct, this would be irrelevant since s. 715.32 refers to the prosecutor being of the opinion that "negotiating the agreement is in the public interest and appropriate".

C. No jurisdiction of Federal Court.

D. Applicant not entitled to mandamus in order to compel exercise of discretion.

E. Judicial Review is unavailable as no legal rights or legal consequences arise from actions of the Respondent

Part III – SUBMISSIONS

A. The Test to be Applied on a Motion to Strike an Application for Judicial Review

20. An application for judicial review may be struck on a motion where it is so clearly improper as to be bereft of any possibility of success.

> ***Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250 (CanLII) *[JP Morgan]*, Moving Party's Book of Authorities ("BOA") Vol. I at Tab 4**

21. The Federal Court of Appeal has recognized that a motion to strike plays an important role in removing unmeritorious cases from the court. Removal of a clearly unmeritorious case from the court system on a preliminary motion can save time, money and resources required to prepare for the judicial review hearing.

> ***Forner v. Professional Institute of the Public Service of Canada*, 2016 FCA 35 (CanLII) *[Forner]*, BOA Vol. I at Tab 8**

22. In *JP Morgan*, the Federal Court of Appeal provided guidance regarding motions to strike application for judicial review. The court began by noting the requirement of an applicant to set out a "complete" and "concise statement" of the grounds to be argued under Rule 301(d) and (e). This requires an applicant to set out all of the legal basis and material facts that, if true, would support the relief sought. The court noted that while the grounds set out must be concise they must not be bald. It is not enough to start a proceeding with unsupported allegations with the hope that some evidence to support it will turn up later.

> ***JP Morgan*, paras. 38 – 45, BOA Vol. I at Tab 4**

23. A notice of application for judicial review must be read carefully in order to understand the real essence of the application. A skillful pleader can make a matter sound like it is administrative, when it is not.

> ***JP Morgan*, paras. 49 – 50, BOA Vol. I at Tab 4**

24. A notice of application for judicial review may therefore be struck when it fails to state a cognizable administrative law claim which may be brought in Federal Court, or the Federal Court is not able to deal with the administrative law claim pursuant to the *Federal Courts Act* or some legal principle or the Federal Court cannot grant the relief sought.

> ***JP Morgan*, para. 66 ff, BOA Vol. I at Tab 4**

25. The present application for judicial review in substance asks the Federal Court to review the exercise of prosecutorial discretion by the Respondent on whether or not to continue with the

prosecution of the criminal proceedings in the Quebec court. For the reasons set out below, the Federal Court does not have jurisdiction over the remediation agreement regime.

26. The present situation amounts to circumstances that justify dismissing the application for judicial review on a preliminary basis. The application does not raise a matter which is amenable to judicial review in the federal court. Even if the Federal Court had jurisdiction to grant relief in a criminal matter that involves the exercise of prosecutorial discretion, such discretion would only be reviewable in the context of an alleged abuse of process or flagrant impropriety. The application does not set out any of the grounds necessary to inquire into the exercise of prosecutorial discretion.

B. The Statutory Scheme and Prosecutorial Discretion - Not Amenable to Judicial Review

(i) The Statutory Scheme

27. The remediation regime is created under Part XXII.1 of the *Criminal Code*. Importantly, the regime does not create any right or entitlements on behalf of an organization accused of having committed an offence to be invited to negotiate a remediation agreement with a prosecutor. Similarly, the remediation regime does not compel a prosecutor to offer an invitation to negotiate, or if negotiations are undertaken, to then enter into a remediation agreement with the organization accused of having committed an offence. This is reflected in the statutory language which in s. 715.32(1) provides "The Prosecutor may enter into negotiation for a remediation agreement with an organization alleged to have committed an offence…"

28. The legislation also sets out certain conditions that must be satisfied before a prosecutor may enter into negotiations for a remediation agreement. The statute makes it clear that the determination of whether these conditions are met is entirely upon the prosecutor. Section 715.32(1) sets out the following conditions which the prosecutor must be satisfied have been met:

> "The prosecutor may enter into negotiations for a remediation agreement with an organization alleged to have committed an offence if the following conditions are met:
>
> **(a)** the prosecutor is of the opinion that there is a reasonable prospect of conviction with respect to the offence;
>
> **(b)** the prosecutor is of the opinion that the act or omission that forms the basis of the offence did not cause and was not likely to have caused serious bodily harm or death, or injury to national defence or national security, and was not committed for the benefit of, at the direction of, or in association with, a criminal organization or terrorist group;
>
> **(c)** the prosecutor is of the opinion that negotiating the agreement is in the public interest and appropriate in the circumstances; and
>
> **(d)** the Attorney General has consented to the negotiation of the agreement.

[emphasis added]

29. The first two conditions upon which the prosecutor must be of the opinion have been met are self-explanatory. We elaborate below with respect to the third and fourth conditions ((c) and (d) above).

30. The third condition which the prosecutor must be of the opinion has been met, requires the prosecutor to be of the opinion that negotiating the agreement would be in the "public interest and appropriate".

31. In deciding whether in the opinion of the prosecutor it is in the "public interest and appropriate" s. 715.32 sets out certain factors to be considered, as well as factors not to be considered. These factors are reproduced below:

> **Factors to consider**
>
> **(2)** For the purposes of paragraph (1)(c), the prosecutor must consider the following factors:
>
> **(a)** the circumstances in which the act or omission that forms the basis of the offence was brought to the attention of investigative authorities;
>
> **(b)** the nature and gravity of the act or omission and its impact on any victim;
>
> **(c)** the degree of involvement of senior officers of the organization in the act or omission;
>
> **(d)** whether the organization has taken disciplinary action, including termination of employment, against any person who was involved in the act or omission;
>
> **(e)** whether the organization has made reparations or taken other measures to remedy the harm caused by the act or omission and to prevent the commission of similar acts or omissions;
>
> **(f)** whether the organization has identified or expressed a willingness to identify any person involved in wrongdoing related to the act or omission;
>
> **(g)** whether the organization — or any of its representatives — was convicted of an offence or sanctioned by a regulatory body, or whether it entered into a previous remediation agreement or other settlement, in Canada or elsewhere, for similar acts or omissions;
>
> **(h)** whether the organization — or any of its representatives — is alleged to have committed any other offences, including those not listed in the schedule to this Part; and

(i) any other factor that the prosecutor considers relevant.

Factors not to consider

(3) Despite paragraph (2)(i), if the organization is alleged to have committed an offence under section 3 or 4 of the *Corruption of Foreign Public Officials Act*, the prosecutor must not consider the national economic interest, the potential effect on relations with a state other than Canada or the identity of the organization or individual involved.

32. It is clear that the list of factors the prosecutor must consider in deciding what is in the "public interest and appropriate" is non-exhaustive as s. 715.32(2) provides the prosecutor with the right to consider "any other factors that the prosecutor considers relevant".

33. The fourth and final condition in s. 715.32(1)(d) that must be met before a prosecutor may decide to enter into negotiations for a remediation agreement is that the Attorney General has consented to the remediation agreement. [2] There are no parameters or factors set out in the legislation that guide the Attorney General on whether or not to consent to the entering into of negotiations for a remediation agreement.

(ii) Prosecutorial Discretion

34. The decision by the Respondent in this case to not invite the Respondents to negotiate a remediation agreement is a classic example of prosecutorial discretion. Prosecutorial discretion has been described by the Supreme Court of Canada, most recently in *R. v. Anderson* 2014 SCC 41 at the following paragraphs:

[39] In *Krieger*, this Court provided the following description of prosecutorial discretion:

> "Prosecutorial discretion" is a term of art. It does not simply refer to any discretionary decision made by a Crown prosecutor. Prosecutorial discretion refers to the use of those powers that constitute the core of the Attorney General's office and which are protected from the influence of improper political and other vitiating factors by the principle of independence. [para. 43]

[40] The Court went on to provide the following examples of prosecutorial discretion: whether to bring the prosecution of a charge laid by police; whether to enter a stay of proceedings in either a private or public prosecution; whether to accept a guilty plea to a lesser charge; whether to withdraw from criminal proceedings altogether; and whether to take control of a private prosecution (para. 46). The Court continued:

> Significantly, what is common to the various elements of prosecutorial discretion is that they involve the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for. Put differently, prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it. Decisions that do not go to

[2] The Applicant notes at footnote 1 on page 7 of the Notice of Application that the authority of the Attorney General under this section has been assigned or delegated to the DPP.

> the nature and extent of the prosecution, i.e., the decisions that govern a Crown prosecutor's tactics or conduct before the court, do not fall within the scope of prosecutorial discretion. Rather, such decisions are governed by the inherent jurisdiction of the court to control its own processes once the Attorney General has elected to enter into that forum. [Emphasis added; emphasis in original deleted; para. 47.]
>
> ...
>
> [44] In an effort to clarify, I think we should start by recognizing that the term "prosecutorial discretion" is an expansive term that covers all "decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it"(*Krieger*, at para. 47). As this Court has repeatedly noted, "Prosecutorial discretion refers to the discretion exercised by the Attorney-General in matters within his authority in relation to the prosecution of criminal offences" (*Krieger*, at para. 44, citing Power, at p. 622, quoting D. Vanek, "Prosecutorial Discretion" (1988), 30 Crim. L.Q. 219, at p. 219 (emphasis added)). While it is likely impossible to create an exhaustive list of the decisions that fall within the nature and extent of a prosecution, further examples to those in *Krieger* include: the decision to repudiate a plea agreement (as in *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566); the decision to pursue a dangerous offender application; the decision to prefer a direct indictment; the decision to charge multiple offences; the decision to negotiate a plea; the decision to proceed summarily or by indictment; and the decision to initiate an appeal. All pertain to the nature and extent of the prosecution. As can be seen, many stem from the provisions of the Code itself, including the decision in this case to tender the Notice.
>
> [45] In sum, prosecutorial discretion applies to a wide range of prosecutorial decision making.
>
> [emphasis added]

35. Where a prosecutor and an organization enter into a remediation agreement and the contents of that agreement have been approved by the court, the criminal proceeding against the organization is stayed. *A fortiori* where the prosecutor decides not to enter into negotiations for a remediation agreement or having entered into negotiations and having failed to reach an agreement or having reached an agreement which does not get approved by the Court, then the criminal proceeding against the organization continues (The October 9, 2018 Letter informed the Applicants in this case of the Respondent's decision to not invite the Applicants to enter into a remediation agreement and to continue the criminal proceedings.). The exercise of prosecutorial discretion is only subject to review by the Court in the rare circumstance where there is an abuse of process which undermines trial fairness or the integrity of the justice system.

> ***R v. Anderson,* [2014] 2 SCR 167, 2014 SCC 41 (CanLII) *[Anderson]*, BOA Vol. II at Tab 14**
> ***R v. Nixon,* [2011] 2 SCR 566, 2011 SCC 34 (CanLII) *[Nixon]*, BOA Vol. II at Tab 21**
> ***Krieger v. Law Society of Alberta*, [2002] 3 SCR 372, 2002 SCC 65 *[Krieger]*, BOA Vol. I at Tab 10**

36. In *Anderson*, the Court noted the consistent affirmations of the Supreme Court of Canada of the necessity and strength of prosecutorial discretion, holding at paragraph 37:

> This Court has repeatedly affirmed that prosecutorial discretion is a necessary part of a properly functioning criminal justice system … the fundamental importance of prosecutorial discretion was said to lie, "not in protecting the interests of individual Crown attorneys, but in advancing the public interest by enabling prosecutors to make discretionary decisions in fulfilment of their professional obligations without fear of judicial or political interference, thus fulfilling their *quasi*-judicial role as 'ministers of justice'". More recently … this Court observed that "[n]ot only does prosecutorial discretion accord with the principles of fundamental justice — it constitutes an indispensable device for the effective enforcement of the criminal law". [Citations omitted.]

37. The Court at paragraph 49 noted that prosecutorial discretion is reviewable only for an abuse of process and gave a number of examples of how this type of misconduct has been described as: "flagrant impropriety"; "undermines the integrity of the judicial process"; "results in trial unfairness"; "improper motives"; and "bad faith". On this point, the Court concluded at paragraph 50:

> Regardless of the precise language used, the key point is this: abuse of process refers to Crown conduct that is egregious and seriously compromises trial fairness and/or the integrity of the justice system. Crown decisions motivated by prejudice against Aboriginal persons would certainly meet this standard. [emphasis added]

See also *R. v. Cawthorne*, 2016 SCC 32, [2016] 1 S.C.R. 983 at paras. 28-30, BOA Vol. II at Tab 19

38. In *Nixon*, the Court emphasized that there must be an evidentiary foundation in order for a review of prosecutorial discretion to be conducted, noting at paragraph 62:

> Quite apart from any such pragmatic considerations, there is good reason to impose a threshold burden on the applicant who alleges that an act of prosecutorial discretion constitutes an abuse of process. Given that such decisions are generally beyond the reach of the court, it is not sufficient to launch an inquiry for an applicant to make a bare allegation of abuse of process. …

39. In *Krieger*, the Court described in general terms the types of activities of a prosecutor and what actions would be subject to deference and what actions would be subject to control of a court at paragraph 47, as follows:

> Significantly, what is common to the various elements of prosecutorial discretion is that they involve the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for. Put differently, prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it. Decisions that do not go to the nature and extent of the prosecution, i.e., the decisions that govern a Crown prosecutor's tactics or conduct before the court, do not fall within the scope of prosecutorial discretion. Rather, such decisions are governed by the inherent jurisdiction of the court to control its own processes once the Attorney General has elected to enter into that forum.

[Emphasis in original.]

(iii) Rationale for why prosecutorial discretion is unreviewable

40. In *Krieger*, the Supreme Court of Canada explained the rationale for why the Attorney General's prosecutorial discretion is generally immune from judicial review by referencing its earlier judgment in *R. v. Power* [1994] 1 SCR 601. At paras. 31 and 32 of *Krieger*,

> [31] This side of the Attorney General's independence finds further form in the principle that courts will not interfere with his exercise of executive authority, as reflected in the prosecutorial decision-making process. In R. v. Power, 1994 CanLII 126 (SCC), [1994] 1 S.C.R. 601, L'Heureux-Dubé J. said, at pp. 621-23:
>
> > It is manifest that, as a matter of principle and policy, courts should not interfere with prosecutorial discretion. This appears clearly to stem from the respect of separation of powers and the rule of law. Under the doctrine of separation of powers, criminal law is in the domain of the executive…
> >
> > Donna C. Morgan in "Controlling Prosecutorial Powers — Judicial Review, Abuse of Process and Section 7 of The Charter" (1986-87), 29 Crim. L.Q. 15, at pp. 20-21, probes the origins of prosecutorial powers:
> >
> > > Most [prosecutorial powers] derive..from the royal prerogative, defined by Dicey as the residue of discretionary or arbitrary authority residing in the hands of the Crown at any given time. Prerogative powers are essentially those granted by the common law to the Crown that are not shared by the Crown's subjects. While executive action carried out under their aegis conforms with the rule of law, prerogative powers are subject to the supremacy of Parliament, since they may be curtailed or abolished by statute.
> >
> > …
>
> In "Prosecutorial Discretion: A Reply to David Vanek" (1987-88), 30 Crim. L.Q. 378, at pp. 378-80, J. A. Ramsay expands on the rationale underlying judicial deference to prosecutorial discretion:
>
> …
>
> > It is fundamental to our system of justice that criminal proceedings be conducted in public before an independent and impartial tribunal. <u>If the court is to review the prosecutor's exercise of his discretion the court becomes a supervising prosecutor. It ceases to be an independent tribunal</u>. [Emphasis in original.]
>
> [32] The court's acknowledgment of the Attorney General's independence from judicial review in the sphere of prosecutorial discretion has its strongest source in the fundamental principle of the rule of law under our Constitution. Subject to the abuse of

process doctrine, supervising one litigant's decision-making process - rather than the conduct of litigants before the court - is beyond the legitimate reach of the court. In Re Hoem and Law Society of British Columbia (1985), 1985 CanLII 447 (BC CA), 20 C.C.C. (3d) 239 (B.C.C.A.), Esson J.A. for the court observed, at p. 254, that:

> ...
>
> The independence of the Attorney-General, in deciding fairly who should be prosecuted, is also a hallmark of a free society. Just as the independence of the bar within its proper sphere must be respected, so must the independence of the Attorney-General.

We agree with these comments. The quasi-judicial function of the Attorney General cannot be subjected to interference from parties who are not as competent to consider the various factors involved in making a decision to prosecute. To subject such decisions to political interference, or to judicial supervision, could erode the integrity of our system of prosecution. Clearly drawn constitutional lines are necessary in areas subject to such grave potential conflict.

***See also Miazga v. Kvello Estate* [2009] 3 SCR 339 at paras. 46-47, BOA Vol. I at Tab 11**

41. The present Application is inviting this court to become a "supervising prosecutor" of the DPP in the context of remediation agreements. The applicant's invitation to this Court to engage in a supervisory role with respect to a prosecutor's decision on whether to extend an invitation to negotiate a remediation agreement, would also result in the court having supervisory authority in circumstances where the negotiations do not result in an agreement being reached. While the legislation does provide the Court with authority regarding remediation agreements and their enforcement, such authority only commences once the parties have successfully negotiated such an agreement. The courts have no role to play prior to that point.

(iv) Non-application of administrative law principles to exercise of prosecutorial discretion

42. This application for judicial review is based solely upon the application of administrative law principles. However, it has long been established that administrative law principles have no application to the exercise of discretion in the criminal justice system.

***R. v. Saikaly*, 1979 CarswellOnt 1336 (C.A.) *[Saikaly]*, BOA Vol. II at Tab 22**

43. There is a presumption that prosecutorial discretion is exercised in good faith. Absent evidence of bad faith, prosecutors are not required to provide reasons for their decisions.

***Anderson*, paras. 54 and 55, BOA Vol. II at Tab 14**

44. In *Nixon* the Supreme Court of Canada noted that the assessment of a decision based on reasonableness had no application to the exercise of prosecutorial discretion.

> The selected framework of analysis also occasioned a more fundamental error. The application judge's assessment of a decision made in the exercise of prosecutorial

discretion for "reasonableness" runs contrary to the principles set out in *Krieger*. Paperny J.A. reiterated these principles, and explained that it is not the role of the court to look behind a prosecutor's discretionary decision to see if it is justified or reasonable in itself (paras. 46-49). By straying into the arena and second-guessing the decision, the reviewing court effectively becomes a supervising prosecutor and risks losing its independence and impartiality. Due regard to the constitutionally separate role of the Attorney General in the initiation and pursuit of criminal prosecutions puts such decisions "beyond the legitimate reach of the court" (*Krieger*, at para. 52).

45. In *Nixon*, the Supreme Court of Canada held at paragraph 52 that it was a "fundamental error" for a judge to assess a decision made in the exercise of prosecutorial discretion on a "reasonableness" analysis.

46. In *Baptiste*, the Ontario Superior Court of Justice noted that paralysis of the criminal law system would result if prosecutorial decisions were allowed to be attacked on the basis of administrative law principles. The Court recognized the inherent inappropriateness of permitting judicial review of these decisions. The court noted that the administration of criminal law would be completely paralyzed if what were essentially preliminary decisions of Crown attorneys were subject to judicial review at every turn, and observed at paragraphs 29 and 30:

> To permit the importation of administrative law principles into the prosecutorial environment of the criminal law deserves reflection upon the potential impact of such a policy. There would be no end to decisions which would be reviewable, including the decision to prosecute or not prosecute an individual; the decision to appeal or not appeal a particular case; the decision to direct further investigation or not direct further investigation in any particular case; the decision to withdraw or not withdraw a particular charge; the decision to stay or not stay a prosecution; the decision to proceed by way of indictment or by summary conviction; the decision to divert a particular case outside the criminal law or not to divert that case outside the criminal law.
>
> It is immediately apparent that to import administrative law principles and apply them to the everyday decision-making functions of the prosecution would effectively result in the complete paralysis of the administration of the criminal law. These decisions are made with obvious frequency in every Crown law office and in every courtroom in the common law world from minute to minute, hour to hour, and day to day. The nature of the workings of prosecutorial discretion make it singularly inappropriate to judicial review.
>
> [emphasis added]

***R. v. Baptiste* 2000 CanLII 22649 (ON SC) *[Baptiste]*, BOA Vol. II at Tab 16**

47. In *Saikaly*, the appellant sought a writ of *certiorari* to quash a direct indictment preferred against him by the Attorney General of Canada. The direct indictment was preferred after several days of a preliminary inquiry but before the preliminary inquiry had been completed. The appellant made two arguments. The first was that the Attorney General's decision to direct an indictment breached the fundamental rights under the Bill of Rights. The second was that the

Attorney General breached the requirements of procedural fairness and natural justice when the decision made without providing the accused with an opportunity to be heard.

48. The Court found that the accused's arguments failed on both points. The court held at para.17:

> In our view, s. 2(e) of the Canadian Bill of Rights and the principles stated in the Nicholson case have no relevance or application to the facts of this case. If the Attorney General must give a hearing to anyone who might be affected every time he proposes to exercise the discretion conferred upon him by virtue of his office the administration of criminal justice would come to a standstill. The principles which we feel are applicable were enunciated most recently by Viscount Dilhorne in Gouriet v. U.P.W. (1977), 3 W.L.R. at p. 319-20. Viscount Dilhorne (a former Attorney General) said the following:
>
> > The Attorney-General has many powers and duties. He may stop any prosecution on indictment by entering a nolle prosequi. He merely has to sign a piece of paper saying that he does not wish the prosecution to continue. He need not give any reasons. He can direct the institution of a prosecution and direct the Director of Public Prosecutions to take over the conduct of any criminal proceedings and he may tell him to offer no evidence. In the exercise of these powers he is not subject to direction by his ministerial colleagues or to control and supervision by the courts.

49. In *Zhang*, the applicant sought judicial review of the Attorney General's decision not to consent to a private prosecution relating to torture alleged to have happened in China. The Court dismissed the application for two main reasons. First, the court found that the exercise of prosecutorial discretion was largely outside of the realm of judicial review. Second, the Court held that the Attorney General did not owe the applicant a duty of fairness to hear his submissions prior to making the decision. With respect to the issue of the review of prosecutorial discretion, the Court held at para.9:

> [9] Case law from across Canada has consistently and repeatedly stressed that an exercise of prosecutorial discretion is largely beyond the legitimate reach of the court. [Emphasis in original.]

***Zhang v. Canada (Attorney General)*, 2006 CarswellNat 3445 (FCA) *[Zhang]*, BOA Vol. II at Tab 27**

50. The Court also noted that in order to review prosecutorial discretion, there had to be flagrant impropriety which had been characterized by courts in the past as conduct which "shocks the conscience of the community" or whether there was "conspicuous evidence of improper motives or of bad faith" or "proof of misconduct bordering on corruption, violation of the law, biased against or for a particular individual or offence".

51. The Court rejected the applicant's argument that the Attorney General should have provided him with an opportunity to be heard based on administrative law principles. At para.23 the Court stated:

As early as 1979, the Ontario Court of Appeal rejected the existence of any such duty. The Court explained that, "[i]f the Attorney-General must give a hearing to anyone who might be affected every time he proposed to exercise the discretion conferred upon him by virtue of his office, the administration of criminal justice would come to a standstill": R. v. Saikaly (1979), 48 C.C.C. (2d) 192 (Ont. C.A.) at page 195.

(v) No allegation of Abuse of Process or Flagrant Impropriety in This Case

52. An application for judicial review must set out the legal basis and the material facts on which it was based. The application for judicial review in this case does not allege any flagrant impropriety, improper motives or abuse of process. Rather, the Applicants merely allege that the Respondent did not agree to an in-person meeting, that she unreasonably exercised her discretion and that she failed to provide compelling reasons for her decision to continue with the criminal prosecution rather than issue an invitation to negotiate a remediation agreement. There is nothing pleaded that would justify any court in undertaking a judicial review of the actions of the DPP which clearly fell within the scope of her prosecutorial discretion.

C. No Jurisdiction of Federal Court

(i) Basic Principle – Federal Court is a Statutory Court

53. The Federal Court is a statutory court which does not have either general or inherent jurisdiction similar to provincial superior courts. In order for the Federal Court to have jurisdiction over a body, the body must fall into the definition of a "federal board, commission or other tribunal". The definition of a "federal board, commission or other tribunal" in s. 2 of the *Federal Courts Act* requires that the person or body derive its powers under an Act of Parliament of Canada. The DPP is not acting as a federal board, commission or other tribunal when deciding not to issue an invitation to an organization to enter into negotiations for a remediation agreement and directing the continuation of a criminal proceeding. The source of her powers comes from the Constitution and the common law.

(ii) A Body Exercising Common Law or Constitutional Duties is Not a "federal board, commission or other tribunal".

54. There is a two-step process to determine whether a body is exercising a power of a federal board, commission or other tribunal. First, it must be determined what jurisdiction the body seeks to exercise and, second, the source or origin of the power being exercised must be determined. Where the common law or the constitution, rather than federal legislation, is the source of the power of the body, the body will not be considered a federal board, commission or tribunal.

***Anisman v. Canada (Border Services Agency)*, 2010 FCA 52 (CanLII) *[Anisman]*, BOA Vol. I at Tab 2**
***Southam Inc. v. Canada (Attorney General)*, 1990 CanLII 8042 (FCA) *[Southam]*, BOA Vol. II at Tab 24**
***Galati v. Canada (Governor General)*, 2015 FC 91 (CanLII) *[Galati]*, BOA Vol. I at Tab 9**
***Toronto Independent Dance Enterprise v. Canada Council*, 1989 CarswellNat 587 (F.C.T.D.) *[Toronto Independent Dance]*, BOA Vol. II at Tab 26**

***Royal Canadian Mounted Police Depusty Commissioner v. Attorney General of Canada*, 2007 FC 564 *[RCMP]*, BOA Vol. II at Tab 23**
***Ochapowace Indian Band v. Canada (Attorney General)*, 2007 FC 920 *[Ochapowace]* (affirmed by the FCA), BOA Vol. I at Tab 12**

55. In *Anisman* the Federal Court of Appeal held at paragraph 29, as follows:

> The operative words of the s. 2 definition of "federal board, commission or other tribunal" state that such a body or person has, exercises or purports to exercise jurisdiction or powers "conferred by or under an Act of Parliament or by or under an Order made pursuant to a prerogative of the Crown…". Thus, a two-step enquiry must be made in order to determine whether a body or person is a "federal board, commission or other tribunal". First, it must be determined what jurisdiction or power the body or person seeks to exercise. Second, it must be determined what is the source or the origin of the jurisdiction or power which the body or person seeks to exercise.

56. In the result, the Court concluded that the Canada Border Service Agency was not operating as a federal board, commission or tribunal in this instance, concluding at paragraph 33:

> … In collecting the mark-up, the CBSA purported to act as the agent of the LCBO and relied on the provisions of the *Liquor Control Act* and the relevant by-law. It was not purporting to act under any federal legislation. Consequently, it is my view that the CBSA was not acting as a "federal board, commission or other tribunal" and the Federal Court does not have jurisdiction regarding the collection of the mark-up and the CBSA's refusal to refund it.

57. The fact that Parliament has passed a statute defining the duties or powers of a body does not mean that the source of the power or duty is a federal statute. In *Southam*, the respondents argued that because Parliament had passed a statute, the *Parliament of Canada Act*, defining privileges, immunities and powers of the Senate and the House of Commons, the Senate derived its powers from federal legislation and therefore should be considered a federal board, commission or tribunal. The Court noted however that the legislation itself was not the means by which the powers under dispute were "granted" or "bestowed" upon the Senate. Those powers were derived from the Constitution. At paragraph 26:

> However, in my view, the words "conferred by or under an Act of the Parliament of Canada" in s. 2 mean that the Act of Parliament has to be the source of the jurisdiction or powers which are being conferred. The privileges, immunities and powers of the Senate are *conferred* by the Constitution, not by a statute, although the latter defines or elaborates upon the privileges, immunities and powers. Such a statute then is the manifestation of Senate privileges but it is not its source; the source is s. 18 of the *Constitution Act, 1867.*

58. In *Galati,* the Federal Court indicated that there was a "threshold" question as to whether the Governor General (and other respondents) could be properly characterized as a federal board, commission or tribunal when giving royal assent to legislation. The Court held that the source of the power of the Governor General was from the Constitution. Although there was a federal

statute (the *Royal Assent Act*), the Governor General was not a federal board, commission or tribunal. The Governor General's powers to provide royal assent pre-dated the royal assent legislation which was passed in 2002. The Court concluded that the power exercised by the Governor General had its source or origin in the Constitution. At paragraph 59 and 60:

> … I note that while the applicants rely on the *Royal Assent Act* to establish that the Governor General is acting pursuant to a statutory power, the preamble provides: "Whereas royal assent is the constitutional culmination of the legislative process". While it is perhaps too obvious a point to be made, the prerogative to assent predates the *Royal Assent Act*, which was enacted in 2002. The *Royal Assent Act* cannot be the source of the Governor General's power to grant royal assent, and it is of no support to the applicants.
>
> In sum, in granting assent, the Governor General is not acting under the *Royal Assent Act*, but is exercising a constitutional responsibility vested in him under section 55 of the *Constitution Act*. The Application against His Excellency, the Right Honourable Governor General David Johnston is therefore dismissed.

59. *RCMP* involved two applications for judicial review, including a request to review the decision of an RCMP official to initiate a criminal investigation into the applicant's conduct. The applicant claimed that the RCMP official was exercising his powers under federal legislation, (the *RCMP Act*), and that therefore his actions were reviewable pursuant to the *Federal Courts Act*. The Court did not agree.

60. The Court held that RCMP officials were acting pursuant to common law powers, holding at paragraph 44 as follows:

> I disagree. While I recognize that the powers of peace officers are incorporated into the RCMP Act, nevertheless, it is well established that when peace officers conduct criminal investigations they are acting pursuant to powers which have their foundation in the common law independent of any Act of Parliament or Crown prerogative. In other words, the RCMP Act imports and clothes with statutory authority police powers, duties and privileges which remain largely defined by common law: …

61. The Court cited the following excerpt from the Supreme Court of Canada decision of *R v. Campbell* at paragraph 27:

> A police officer investigating a crime is not acting as a government functionary or as an agent of anybody. He or she occupies a public office initially defined by the common law and subsequently set out in various statutes. …

***R. v. Campbell*, [1999] 1 SCR 565 (CanLII) *[Campbell]*, BOA Vol. II at Tab 18**

62. The Court went on to observe that a police officer in the course of an investigation is "independent of the control of the executive government", "not subject to political direction" and

"answerable to the law and, no doubt, to their conscience".[3] RCMP officials could not be characterized as a "federal board, commission or other tribunal."[4]

63. *Ochapowace* is another Federal Court decision (affirmed by the Federal Court of Appeal) which considered a request for a judicial review of the decision of an RCMP official, this time with respect to a decision not to proceed with trespass charges against provincial officials. The Court started by observing that police and prosecutorial discretion is a "cornerstone" of the criminal justice system. With respect to the issue of jurisdiction, the Court applied the reasoning in *RCMP* and noted that police powers have foundation in common law and that because police are independent from the executive, they cannot be considered a federal board, commission or tribunal.[5]

(iii) Prosecutorial Discretion is Not Based on a Federal Statute and the DPP was Therefore Not Acting as a Federal Board, Commission or Tribunal

64. Prosecutorial discretion is not a power bestowed by legislation. Instead, it is a well-established historical power, originating in England as early as the thirteenth century, based on the King's Attorney's power to initiate, manage and terminate prosecutions. In Canada, prosecutorial discretion has a constitutional dimension. Prosecutorial discretion is based on the independence of the Attorney General with its source under the Constitution.

> ***Krieger, supra*, at paras. 24, 25, 26 and 32, BOA Vol. I at Tab 10**
> ***Nixon, supra*, at paras. 20 and 52, BOA Vol. II at Tab 21**

65. In *Krieger*, the Court considered the constitutional nature of prosecutorial discretion and held at paragraphs 26 and 32:

> In Canada, the office of the Attorney General is one with constitutional dimensions recognized in the *Constitution Act, 1867*. Although the specific duties conventionally exercised by the Attorney General are not enumerated, s. 135 of that Act provides for the extension of the authority and duties of that office as existing prior to Confederation. …
>
> The court's acknowledgment of the Attorney General's independence from judicial review in the sphere of prosecutorial discretion has its strongest source in the fundamental principle of the rule of law under our Constitution. Subject to the abuse of process doctrine, supervising one litigant's decision-making process — rather than the conduct of litigants before the court — is beyond the legitimate reach of the court. …

66. In the present case, the DPP was exercising (on behalf of the Attorney General) a power of ancient origin from England continued in Canada based on the Constitution. The source of her prosecutorial discretion to continue with the proceedings of the Applicants was not a federal

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[3] *RCMP* at para. 46, BOA Vol. II at Tab 23
[4] *RCMP* at para. 46, BOA Vol. II at Tab 23
[5] The Federal Court held that the judicial review application could be dismissed strictly on jurisdictional grounds although it did go on to consider the issue on the merits. The Federal Court of Appeal dismissed the appeal without referring to the jurisdiction issue.

statute. To accept the Applicant's reasoning would place the Federal Court in the position of being a "supervising prosecutor", which the Supreme Court of Canada has warned against.

67. The existence of statutory factors to be taken into account with respect to a remediation agreement set out in section 715.32 of the *Criminal Code*, does not mean that this is the source of prosecutorial discretion; rather, it provides guidance on the issues which clothe with statutory authority the generally understood principle of prosecutorial discretion. In fact, it is clear that Parliament was mindful of the principle of prosecutorial discretion in the legislation which specifically refers to the concept in s. 715.36(2).

(iv) An Additional Reason Why DPP is Not a Federal Board, Commission or Tribunal

68. In *Toronto Independent Dance* the Federal Court held that creation by a federal statute and receipt of government funding is not determinative of whether a body should be characterized as a federal board, commission or tribunal. The fact that the body was deliberately created to be at arm's length from the government, and was given wide discretion, suggests that it should not be characterized as a federal board, commission or tribunal.

***Toronto Independent Dance*, at para. 19, BOA Vol. II at Tab 26**

69. It is notable that both *RCMP* and *Ochapowace* speak of police investigative powers and police and prosecutorial discretion as having a "foundation" in the common law. *RCMP* acknowledges at paragraph 44 that the RCMP Act "imports and clothes with statutory authority police powers". The Court also quoted a previous Supreme Court of Canada case that noted that police officers occupied a "public office initially defined by the common law and subsequently set out in various statutes". The same reasoning applies to prosecutorial discretion.

70. The *Director of Public Prosecution Act* was originally introduced in Bill C-2 as part of the *Federal Accountability Act*. Both the discussions in Hansard and the legislative summary of the *Federal Accountability Act* make it clear that the main purpose of introducing this legislation was to ensure independence of prosecutors. The following are all brief quotes from the Edited Hansard Number 009, 39th Parliament, 1st Session, April 25, 2006:

> **Hon. Stephen Owen (Vancouver Quadra, Lib.):**
>
> It gets to the real nub of the issue, and that is to ensure that there is not even the appearance of political interference between the Attorney General who has a dual political role of being Minister of Justice into the prosecution decisions. The Attorney General is of course the chief law office of the country and must have overall responsibility for prosecutions. To ensure that there is not even the appearance of improper influence it exists in the bill, and I think the wording is good.
>
> **Mr. Ed Komarnicki (Parliamentary Secretary to the Minister of Citizenship and Immigration, CPC):**

> Another area of change is in the creation of a director of public prosecutions. Part 3 of the act creates the office of the director of public prosecutions and allows this office to initiate and conduct wholly independent investigations and prosecutions, including the decision to lay charges unless the federal Attorney General publicly directs otherwise. …

Edited Hansard Number 009, 39th Parliament, 1st Session, April 25, 2006, BOA Vol. II at Tab 29

71. Although the DPP acts on behalf of the Attorney General, the *Director of Public Prosecutions Act* emphasizes the importance of the independence of the DPP. The DPP is an independent organization, separate from the Department of Justice, and its objectives are to be carried out in a non-partisan manner. The DPP acts independently from the Attorney General.

***Director of Public Prosecutions Act* SC 2006, c.9 s. 121, Tab 3 of Appendix A**

(v) Federal Court has Limited Jurisdiction over Criminal Matters, and Should Decline to Exercise Jurisdiction that Would Result in the Fragmentation of a Criminal Process

72. Federal Court power over criminal matters is limited and circumscribed by express statutory provisions. In particular, the Federal Court does not have the expertise with respect to criminal procedure which has been developed by provincial courts. The considerations in criminal matters are different than questions of civil and administrative matters that are normally dealt with by the Federal Court.

***RCMP, supra*, at paras. 37, 38 and 50, BOA Vol. II at Tab 23**
***Ochapowace, supra*, BOA Vol. I at Tab 12**

73. In *RCMP*, Justice Tremblay-Lamer noted at paragraphs 37 and 38:

> … Both the respondent and the intervener stress that when C/Supt. Paulson decides to initiate a criminal investigation, he is acting in his capacity as a peace officer, not as an agent of a government body. The independence of the police when acting in their capacity as criminal investigators is an important principle embraced by the rule of law and premised on the necessity of peace officers being free to make inquiries into criminal allegations without undue interference by the executive or Parliament.
>
> I am inclined to agree with the respondent and intervener with regard to the criminal investigation. I am not convinced that the Federal Court has the requisite jurisdiction to sit in review of a peace officer's decision to initiate a criminal investigation. The Federal Court is a statutory court that derives all of its jurisdiction from the *Federal Courts Act* and, unlike provincial superior courts, it has no general or inherent jurisdiction to deal with criminal matters … While the Federal Court does have limited criminal jurisdiction, for examples see section 4 [as am. by S.C. 2002, c. 8, s. 16] of the *Federal Courts Act* and rule 472 of the *Federal Courts Rules*, this jurisdiction is circumscribed by express or implied statutory provisions. [Citations omitted.]

74. It is important to note that the Court went on to observe that even if the Federal Court did have jurisdiction, it would not be the appropriate forum to quash the investigation. On this point, the Court held at paragraph 50:

> … Quashing a criminal investigation is really a question of criminal procedure, an area in which the provincial superior courts because of their inherent criminal jurisdiction have developed greater relative expertise and specialization than the Federal Courts. It would be most unusual for the Federal Courts to venture into a realm of what is essentially criminal procedure: … Different considerations come into play in the criminal justice system than those related to the major function of the Federal Courts, which is to deal with questions of an administrative and civil character and other matters of particular federal concern.

75. This approach was adopted in *Ochapowace*.

76. In *Strickland* v *Canada (Attorney General)* [2015] 2 S.C.R. 713, the Supreme Court of Canada upheld a decision by the Federal Court dismissing an application for judicial review seeking a declaration that the *Federal Child Support Guidelines* (the "*Guidelines*") were unlawful under the *Divorce Act*. The Court found that although the Federal Court had jurisdiction, the provincial superior courts also had jurisdiction to address the validity of the *Guidelines* when adjudicating claims properly before the superior courts. At para 22, Cromwell J stated:

> *TeleZone* and the related cases, although they did not decide the precise point in issue here, support the principle that the provincial superior courts have the authority to consider and rule on the legality of the actions of federal tribunals when doing do is a necessary step in adjudicating claims properly before the superior courts.

77. The Supreme Court of Canada also concluded that the Federal Court properly exercised its discretion to deny judicial review largely based on the greater expertise of provincial superior courts in family law. Moreover, as a result of federal legislation, the Federal Courts have virtually no jurisdiction in family law cases.

78. Even if the Federal Court had jurisdiction in this matter (which it does not), the same principles should operate in this case. The provincial courts of criminal jurisdiction have far greater expertise in criminal law matters than the Federal Court. If the Applicants wish to challenge the decision of the Respondent to not enter into negotiations for a remediation agreement, then they should do within the context of the ongoing criminal process in the Quebec court.

79. It is inappropriate for an accused person to bring satellite or ancillary proceedings that would take on a life of their own and interrupt the criminal process. The correct process is to challenge any issues about rights or fairness in the subject prosecution and appeals if necessary.

> ***Director of Public Prosecution's Ex Parte Kebeline*, [1999] UK HL 43 *[Kebeline]*, BOA Vol. I at Tab 7**

***R. v. De Sousa*, [1992] 2 SCR 944, 1992 CanLII 80 (SCC) *[De Sousa]*, BOA Vol. II at Tab 20**
***R. v. Basi*, 2009 BCSC 1685 (CanLII) *[Basi]*, BOA Vol. II at Tab 17**
***R. v. Awashish*, 2018 SCC 45 *[Awashish]* at para. 10, BOA Vol. II at Tab 15**

80. In *De Sousa*, the accused brought a pre-trial motion attacking the constitutionality of the Criminal Code section that he was charged under. The Supreme Court of Canada held at page 8 (cited to CanLII):

> ... The first is that criminal proceedings should not be fragmented by interlocutory proceedings which take on a life of their own. This policy is the basis of the rule against interlocutory appeals in criminal matters...

81. In *Basi*, the accused were charged with corruption, fraud and breach of trust. They intended to bring an application alleging that conduct on the part of the RCMP and the special prosecutor constituted an abuse of process. This particular decision dealt only with the issue of the timing of the application. The defence wanted the application to be heard prior to the trial itself, while the Crown alleged that it should heard at the end of the trial. The court repeated the general proposition outlined in *De Sousa* that "criminal proceedings should not be fragmented by interlocutory proceedings which take on a life of their own". The Court also noted that *Charter* challenges should be adjudicated with a factual foundation. The court then noted at paragraph 22:

> Both of these policies favoured disposition of applications at the end of the case. Further, courts should not depart from these policies unless there is a strong reason for doing so...

82. The Court noted that in order to resolve the issue of whether there had been abuse of process, it was necessary to determine whether the alleged misconduct had the effect of interfering with trial fairness.

83. In *Kebeline*, the accused were charged with terrorism offences. In order for a terrorism offence to proceed, the consent of the Attorney General was required. The DPP approved the charges. During the course of the trial, the accused raised the argument that the provisions of the *Prevention of Terrorism (Temporary Provisions) Act 1989* (the "*Terrorism Act*") were contrary to the *European Convention for the Protection Human Rights and Fundamental Freedoms* (the "*Convention*") which the UK had signed. The DPP did not agree and declined to withdraw consent for the prosecution. Because of problems with lack of disclosure, a new trial had to be ordered. In the interim, the accused brought an application for judicial review to the Divisional Court claiming that the decision of the DPP to continue its consent was an error of law. The Divisional Court granted a declaration that the DPP's decision to proceed with the prosecution was unlawful. The House of Lords overturned this decision.

84. The main House of Lords judgment was given by Lord Steyn and concurred in by the other Law Lords. Lord Steyn made the following finding relating to both the issue of prosecutorial discretion and the prohibition against satellite proceedings at page 13 as follows:

> My Lords, I would rule that absent dishonesty or *mala fides* or an exceptional circumstance, the decision of the DPP to consent to the prosecution of the Respondents is

> not amenable to judicial review. And I would further rule that the present case falls on the wrong side of that line. While the passing of the Human Rights Act 1998 marked a great advance for our criminal justice system it is in my view vitally important that, so far as the courts are concerned, its application in our law should take place in an orderly manner which recognizes the desirability of all challenges taking place in the criminal trial or on appeal. The effect of the judgment of the Divisional Court was to open the door too widely to delay in the conduct of criminal proceedings. Such satellite litigation should rarely be permitted in our criminal justice system. In my view the Divisional Court should have dismissed the Respondents' application.

85. Finally, it should be noted that the definition of Attorney General in the Criminal Code includes, where applicable, the Attorney General or Solicitor General of a province. It would bring further and unnecessary confusion to the criminal process to have the Federal Court accepting jurisdiction over a provision of the Criminal Code depending on the parties involved.

> ***Criminal Code*, s. 2, Tab 1 of Appendix A**

D. Applicant not entitled to *mandamus* in order to compel exercise of discretion

86. *Mandamus* is generally unavailable with respect to a discretionary decision of a public official. *Mandamus* is not available to require a prosecutor to exercise discretion in a particular way.

> ***Brown & Evans*, *supra*, at para. 1:3100, BOA Vol. II at Tab 28**
> ***Apotex Inc. v. Canada (Attorney General)*, [1994] 1 FC 742, 1993 CanLII 3004 (FCA) *[Apotex]*, BOA Vol. I at Tab 3**
> ***CUPE, Air Canada Component v. Canada (Labour)*, 2012 FC 1484 (CanLII) *[CUPE]*, BOA Vol. I at Tab 5**

87. *Brown & Evans* outline the nature of mandamus at paragraph 1:3100, as follows:

> Mandamus is issued to compel the performance of a public legal duty. Accordingly, the respondent in a proceeding for mandamus will normally be a public official. However, since mandamus, like the mandatory injunction it resembles, is coercive in nature, the courts have carefully circumscribed the circumstances in which it will issue. By definition, it has been said not to be available as an interim form of relief. Furthermore, as with all of the prerogative remedies, it may also be denied in the exercise of the court's discretion, which includes consideration of whether there is any utility in issuing the order. Finally, mandamus will not normally issue against the Attorney General since "when performing his accusatorial functions [he] is exercising his executive authority and while so acting, he is not subject to review by the courts barring flagrant impropriety." In the leading decision on mandamus, Laidlaw J.A. set out the jurisdictional prerequisites for its issuance as follows:
>
> [Mandamus] is appropriate to overcome the inaction or misconduct of persons charged with the performance of duties of a public nature...
>
> Before the remedy can be given, the applicant for it must show:

> (1) 'a clear, legal right to have the thing sought by it done, and done in the manner and by the person sought to be coerced'...
>
> (2) 'The duty whose performance it is sought to coerce by mandamus must be actually due and incumbent upon the officer at the time of seeking the relief, and the writ will not lie to compel the doing of an act which he is not yet under obligation to perform'...
>
> (3) That duty must be purely ministerial in nature, 'plainly incumbent upon an officer by operation of law or by virtue of his office, and concerning which he possesses no discretionary powers'
>
> (4) There must be a demand and refusal to perform the act which it is sought to coerce by legal remedy...
>
> Where these conditions have been met, mandamus can issue regardless of the classification of the duty as judicial, administrative or legislative in nature. [Footnotes omitted.]

88. As noted by *Brown & Evans* at paragraph 1:3230:

> The presence of a discretion to act or not, or to act in one of a number of ways, will preclude the issue of mandamus since there will be no specific duty to act in a particular way. In other words, where a public official has a discretion, mandamus will not issue to compel its exercise in the manner sought by the applicant.

89. *Apotex* is regarded as the leading case on the availability of mandamus. After conducting an extensive review of the jurisprudence, the Federal Court of Appeal at page 16 noted the following regarding discretionary duties:

> 4. Where the duty sought to be enforced is discretionary, the following rules apply:
>
> > (a) in exercising a discretion, the decision-maker must not act in a manner which can be characterized as "unfair", "oppressive" or demonstrate "flagrant impropriety" or "bad faith";
> >
> > *(b) mandamus* is unavailable if the decision-maker's discretion is characterized as being "unqualified", "absolute", "permissive" or "unfettered";
> >
> > *(c)* in the exercise of a "fettered" discretion, the decision-maker must act upon "relevant", as opposed to "irrelevant", considerations;
> >
> > *(d) mandamus* is unavailable to compel the exercise of a "fettered discretion" in a particular way; and

> *(e) mandamus* is only available when the decision-maker's discretion is "spent"; i.e., the applicant has a vested right to the performance of the duty.
>
> [Citations omitted.]

90. In *CUPE*, the court noted the very high threshold that is required in order for prosecutorial discretion to be reviewable and summarized the factors at paragraph 40:

> Prosecutorial discretion is reviewable only in exceptional cases and the circumstances of this case do not meet the threshold. There is no evidence that there are improper motives or bad faith or that failure to prosecute would shock the conscience of the community or bring the administration of justice into disrepute. There is no evidence of a policy of non-enforcement of the Code or a consistent pattern or practice amounting to a policy decision not to investigate.

91. The court went on to note that the remedy of *mandamus* was not available to the union. Mandamus will not issue to require a decision-maker to exercise discretion in a certain way.

92. Section 715.32(1), (2) and (3) of the Criminal Code set out a number of factors that a prosecutor must consider, as well as factors that should not be considered in determining whether to issue an invitation to negotiate a remediation agreement. The Respondent having considered these factors, and having exercised her prosecutorial discretion to not invite the Applicants to engage in a negotiation for a remediation agreement, cannot be compelled by mandamus to now exercise her discretion in a different fashion.

E. Judicial Review is unavailable as no legal rights or legal consequences arise from actions of the Respondent

93. A court will not assume jurisdiction to judicially review administrative action where there has been no effect on an applicant's legal rights and there has been no imposition of a legal duty or prejudicial effect.

> ***Pieters v. Canada (Attorney General)*, 2007 FC 556 (CanLII), para. 68, BOA Vol. I at Tab 13**
> ***Democracy Watch v. Conflict of Interest and Ethics Commissioner*, 2009 FCA 15 (CanLII), paras. 10 and 11, BOA Vol. I at Tab 6**
> ***Air Canada v. Toronto Port Authority et al.*, 2011 FCA 347 (CanLII), paras. 28-30, BOA Vol. I at Tab 1**

94. While the Applicants have the right to be assumed not guilty and the right to a fair trial, they have no right or entitlement at common law or under Part XXII.1 of the *Criminal Code* to be invited to enter into negotiations for a remediation agreement with the Respondent. The legislation only contemplates that a prosecutor *may* decide to extend an invitation to negotiate to an accused organization – but only after the prosecutor has been satisfied that it would be in the public interest and appropriate and that various other conditions have been met.

95. The remediation agreement regime did not eliminate the possibility of an organization being found guilty of an offence. Furthermore, it did not require the prosecutor to consider the possibility of entering negotiations for a remediation agreement as the preferable alternative to proceeding with a criminal prosecution.

96. The fact that the Respondent did not invite the Applicants to enter into negotiations for a remediation agreement did not cause any prejudice to the Applicants. Moreover, there is no certainty that the negotiations would have resulted in a remediation agreement or the approval of same by a court.

PART IV – ORDER SOUGHT

97. The Respondent requests an Order:

(a) that the Applicant's Application be struck without leave to amend pursuant to Rule 359 of the *Federal Courts Rules*;

(b) if this motion is successful in whole or in part, an award of costs in favour of the Respondent; and,

(c) such further and other relief as counsel may request and this Honourable Court deems just.

******

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of January, 2019.

PERLEY-ROBERTSON, HILL & McDOUGALL LLP/s.r.l, counsel for the Respondent

By: _____
David Migicovsky

And by: _____
Andrew J.F. Lenz

PART V – AUTHORITIES

No.	Authority
1.	*Air Canada v. Toronto Port Authority et al.*, 2011 FCA 347 (CanLII)
2.	*Anisman v. Canada (Border Services Agency)*, 2010 FCA 52 (CanLII)
3.	*Apotex Inc. v. Canada (Attorney General)*, [1994] 1 FC 742, 1993 CanLII 3004 (FCA)
4.	*Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250 (CanLII)
5.	*CUPE, Air Canada Component v. Canada (Labour)*, 2012 FC 1484 (CanLII)
6.	*Democracy Watch v. Conflict of Interest and Ethics Commissioner*, 2009 FCA 15 (CanLII)
7.	*Director of Public Prosecution's Ex Parte Kebeline*, [1999] UK HL 43
8.	*Forner v. Professional Institute of the Public Service of Canada*, 2016 FCA 35 (CanLII)
9.	*Galati v. Canada (Governor General)*, 2015 FC 91 (CanLII)
10.	*Krieger v. Law Society of Alberta*, [2002] 3 SCR 372, 2002 SCC 65
11.	*Miazga v. Kvello Estate [2009] 3 SCR 339*
12.	*Ochapowace Indian Band v. Canada (Attorney General)*, 2007 FC 920
13.	*Pieters v. Canada (Attorney General)*, 2007 FC 556 (CanLII)
14.	*R v. Anderson*, [2014] 2 SCR 167, 2014 SCC 41 (CanLII)
15.	*R. v. Awashish*, 2018 SCC 45
16.	*R. v. Baptiste,* 2000 CanLII 22648 (ON SC)
17.	*R. v. Basi*, 2009 BCSC 1685 (CanLII)
18.	*R. v. Campbell,* [1999] 1 SCR 565 (CanLII)
19.	*R. v. Cawthorne*, 2016 SCC 32, [2016] 1 S.C.R. 983
20.	*R. v. De Sousa*, [1992] 2 SCR 944, 1992 CanLII 80 (SCC)
21.	*R v. Nixon*, [2011] 2 SCR 566, 2011 SCC 34 (CanLII)
22.	*R. v. Saikaly*, 1979 CarswellOnt 1336 (C.A.)
23.	*Royal Canadian Mounted Police Deputy Commissioner v. Attorney General of Canada*, 2007 FC 564
24.	*Southam Inc. v. Canada (Attorney General) (C.A.)*, 1990 CanLII 8042 (FCA)
25.	*Strickland v Canada (Attorney General)* [2015] 2 S.C.R. 713
26.	*Toronto Independent Dance Enterprise v. Canada Council*, 1989 CarswellNat 587 (F.C.T.D.)
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28.	*House of Commons Debates*, vol. 141, 1st Sess., 39th Parl., April 25, 2006, pp. 462 and 520
	Texts
29.	Donald J.M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (Toronto, Ontario: Canvasback Publishing, 2009)
	Statutes
30.	*Criminal Code R.S.C., 1985, s. 2 and c.C-46* Part XXI.2
31.	*Director of Public Prosecutions Act* SC 2006 c.9 s.121

Court File No. T-1843-18

FEDERAL COURT

SNC-LAVALIN GROUP INC. *et al.*
Applicants

and

THE DIRECTOR OF PUBLIC PROSECUTIONS
Respondent

MEMORANDUM OF FACT AND LAW OF THE DIRECTOR OF PUBLIC PROSECUTIONS

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Court File No. T-1843-18

FEDERAL COURT

SNC-LAVALIN GROUP INC. *et al.*
Applicants
(Responding Parties)

and

THE DIRECTOR OF PUBLIC PROSECUTIONS
Respondent
(Moving Party)

MOTION RECORD OF THE MOVING PARTY

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